

**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

□ □

:: ORDER ::

Smt.Bimla

Vs.

Smt.Kalawati & anr.

S.B.CIVIL WRIT PETITION NO.7236/2005.

Date of order

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• •

3rd July 2006

PRESENT

HON'BLE MR.JUSTICE DINESH MAHESHWARI

Mr.Manish Shishodia, for the petitioner.

Mr.T.C.Sharma, for the respondent.

BY THE COURT:

The petitioner-Smt.Bimla, having been declared elected as Sarpanch, Gram Panchayat, Bharwana, Tehsil, Bhadra District Hanumangarh in the elections held on 31.01.2005, is facing an election petition filed by the respondent No.1, Smt. Kalawati wife of Ramswaroop, challenging her election on the ground of improper reception and counting of some of the votes in her favour. The learned Civil Judge (Senior Division), Bhadra hearing the election petition, after evidence and final arguments, has proceeded to pass

an order on 03.12.2005 for inspection and recounting of ballot papers. The petitioner has questioned the legality and validity of the order dated 03.12.2005 in this writ petition.

Briefly put the facts relevant for determination of the questions involved in this writ petition are that in the aforesaid elections held on 31.01.2005 there were six candidates contesting for the office of Sarpanch, Gram Panchayat, Bharwana, Tehsil, Bhadra. According to the election petitioner (respondent No.1), in all 2230 votes were polled, of which 13 were rejected as invalid and the election petitioner has stated the following particulars ad seriatim about the candidates and the number of votes polled by them:-

S.No.	Name of candidate	Number of votes polled
1.	Kamla	02
2.	Kalawati w/o Ramswaroop (respondent No.1)	545
3.	Kalawati w/o Jhandu Ram	530
4.	Bimla (petitioner)	591
5.	Roshni	485
6.	Sushila	64

Result was declared on 31.01.2005 and the present petitioner Smt.Bimla having polled 591 votes was declared elected, nearest

rival being the respondent No.1 (election petitioner) Smt.Kalawati having secured 545 votes.

The respondent No.1 Smt.Kalawati challenged the election of the petitioner fundamentally on two grounds: First, it was alleged that the election petitioner had received highest number of valid votes and the Returning Officer has wrongly shown the returned candidate having secured 591 votes. According to the election petitioner, at the time of scrutiny of ballot papers, 120 ballot papers were found carrying the seal not in the column meant for the candidate Smt.Bimla (petitioner) but in each of such ballot papers, the seal was placed at the line dividing the names of Smt.Bimla and other candidate Smt.Kalawati wife of Jhandu Ram; the intention of the voter was not clear and, therefore, all these 120 votes were required to be rejected as invalid; objections were raised by the election petitioner for rejection of these votes and they were initially kept aside but then were counted as valid votes in favour of the present petitioner and such counting has materially affected the result. According to the election petitioner, after deducting these 120 votes, the number of votes received by the present petitioner would be 471 and in fact she had not received even 471 votes but the scrutiny and counting was not carried out correctly and impartially and invalid votes were improperly counted in favour of the present petitioner. Secondly, it was alleged that in the scrutiny, 30 ballot papers were found carrying thumb impressions and not the seal in the column of

present petitioner; objections were raised about these 30 ballot papers also and they too were kept aside but then were improperly counted in favour of the present petitioner and these 30 votes were also required to be deducted from the number of votes counted in her favour. The election petitioner has summed up her submissions that aforesaid 150 votes were required to be rejected as invalid and their counting in favour of the returned candidate has materially affected the election result; that her actual number of votes would be 441 only and the election petitioner having received 545 valid votes was entitled to be declared elected. It has also been averred that candidate made a request for re-examination and recounting of the ballot papers and for declaring the election petitioner as elected but the Returning Officer illegally and improperly rejected such request that has affected the election result and upon proper counting the election petitioner would have been elected as Sarpanch. On the grounds and averments aforesaid, the present respondent No.1 (election petitioner) has sought relief of declaration of result of election of the present petitioner to be void and for inspection and recounting of all the ballot papers and for declaring her as elected.

The election petition has been put to contest by the present petitioner with the submissions that number of votes stated by the election petitioner were not correct inasmuch as Kalawati wife of Ramswaroop (election petitioner) received 541 and not 545 votes. Similarly, Kalawati wife of Jhandu Ram received 532 and not 530

votes and that the present petitioner Smt.Bimla was declared elected by a margin of 50 votes and not 46 as alleged. The allegations about improper reception of votes and improper counting of invalid votes in favour of the returned candidate have been specifically denied and the allegations about 120 invalid votes as made in para 4 (ka) of the election petition and about another 30 invalid votes as made in para 4 (kha) of the election petition have been denied as fanciful and incorrect. It has been asserted that the scrutiny and counting was carried out properly and impartially in the presence of the election petitioner and no objection was raised at the time of counting; and after loosing the election, the petition has been submitted on baseless grounds. It has been asserted that the election petitioner never made any written or oral request for re-examination or recounting of the votes and the election petitioner was not entitled to have the ballot papers recounted on the basis of such baseless averments.

Following issues have been framed for determination of the questions involved in the election petition:-

“(1) क्या ग्राम पंचायत भरवाना के सरपंच पद के चुनाव 31.1.05 की मतगणना में प्रत्यर्थी बिमला के 591 मतों में 120 मतपत्र मोहर बिमला व कलावती पत्नी झिण्डुराम के खानों के बीच स्थित विभाजन रेखा पर होने से अवैध मतों की गणना की गई है, जिसे कम कराने की प्रार्थीया अधिकारी है ?

प्रार्थीया याची

(2) क्या प्रत्यर्थी बिमला के पक्ष में जोड़े गए मतपत्रों में 30 मतपत्र मोहर के निशान के स्थान पर अगूँठा निशानी होने से, अवैध मत भी प्रत्यर्थी को प्राप्त कुल मतों से कम करवाने की प्रार्थीया अधिकारी है?

प्रार्थीया याची

(3) क्या याचि के विरुद्ध विबन्धन का सिद्धान्त लागू होता है ?

प्रत्यर्थी

(4) अनुतोष ?”

In evidence, the election petitioner Smt.Kalawati has examined herself as AW-1 and has also examined Ranveer Singh as AW-2, Dharpal as AW-3 and Bhagwat Dayal as AW-4. The present petitioner has examined herself as NAW-1 and has also examined Om Prakash as NAW-2 and Maniram as NAW-3. It appears from the statement of the election petitioner Smt.Kalawati that she has produced in documentary evidence a copy of election result as Ex.1, a copy of challan of the deposit of costs as Ex.A/2, certificate of posting for endorsing copy of election petition to the Collector as Ex.A/3 and a carbon copy of the forwarding letter as Ex.A/4.

The petitioner has averred in the writ petition that on 03.12.2005, the learned Civil Judge while hearing the matter finally, after taking into account the evidence led by the parties, proceeded to direct production of ballot papers for disposal of the election petition in spite of objections raised by the petitioner regarding the very maintainability of the election petition.

A look at the impugned order shows that the learned Judge observed that the election petitioner has stated about making written and oral application for recounting and there was nothing on record to show that Returning Officer proceeded with recounting despite objections and an application had been moved on 12.11.2005 before the court also for re-examination and recounting of the votes. The learned Judge further observed that normally recount is not to be ordered as a matter of course but in a given case when it does appear with reference to the evidence on record that for the purpose of determination of the questions in controversy and in the interest of justice, inspection and recounting of ballot papers is necessary and the election petitioner is able to establish a prima facie case for recounting and inspection, then it would be proper to pass such an order. The learned Judge observed that in the present case, there is a difference about number of votes cast and there is a difference about the number of votes received by Kalawati wife of Jhandu Ram; 120 ballot papers are stated to be carrying seal at the dividing line not showing clear intention of the voters; and 30 ballot papers are stated to be carrying thumb impressions; and these 150 doubtful votes were counted in three stacks of 50 each in favour of the returned candidate Smt.Bimla who was declared elected by a margin of 46 votes and who alleges herself to have won by 50 votes. On these considerations, the learned Judge has recorded the finding and conclusions thus:

“उक्त समस्त का विवेचन करने के उपरान्त मतगणना के दौरान याची की आपत्ति पुनः गणना करवाने की मौखिक रही हो या लिखित दोबारा मतगणना रिटर्निंग अधिकारी ने याची के विरोध करने के पश्चात की हो, ऐसा नहीं पाया गया है। इस प्रकार जैसी साक्ष्य पत्रावली पर आई, उससे प्रथम दृष्टया याची यह साबित करने में सफल रही है कि पक्षकारों के मध्य विवाद बिन्दू के न्यायिक निस्तारण के लिए मत पत्रों का निरीक्षण किये बिना उनकी पुनः गणना किये बिना विरचित किये गये विवादकों का भलीभांति निस्तारण किया जाना सम्भव नहीं है। अतः न्यायहित में मतपत्रों की पुनः गणना व निरीक्षण किये जाने की आवश्यकता याची के पक्ष में प्रथम दृष्टिया साबित पाई गई है अतः न्यायहित में व अति आवश्यक होने से गांव भरवाना के सरपंच पद के मतदान की 31.1.05 की मतपत्रों की पेटियां मंगवाई जाकर मतों की पुनः गणना व निरीक्षण का आदेश निम्न प्रकार किया जाता है।

:- आदेश :-

याची कलावती द्वारा प्रस्तुत चुनाव याचिका विरुद्ध अयाची बिमला देवी के पूर्ण न्यायिक निस्तारण के लिए मतपत्रों का निरीक्षण व पुनः गणना किया जाना न्यायोचित व अति आवश्यक पाये जाने से; जिला निर्वाचन अधिकारी(जिला कलेक्टर)हनुमानगढ़ को ग्राम पंचायत भरवाना के सरपंच पद के हुए मतदान दिनांक 31.1.05 के मतपत्रों को सील्ड पैकेट में न्यायालय के समय दिनांक 19.12.05 को आवश्यक रूप से प्रस्तुत करने हेतु तहरीर जारी की जावे, ताकि प्रकरण का शीघ्र व सही ढंग से न्यायिक निस्तारण हो सके।”

Challenging the order dated 03.12.2005 the petitioner has urged in this writ petition that the Tribunal has committed error apparent on the face of record in failing to consider that secrecy of ballot is sacrosanct and cannot be ordered to be violated in such a cursory manner; that Tribunal has not categorically recorded a finding before ordering recount or inspection of the votes that such an order is absolutely essential and the election petition cannot be decided without the same; that the so-called findings have been

recorded without even adverting to the specific averments in reply to the election petition; that there is no pleading or evidence so as to justify examination of ballot papers or of recounting; that election petition does not contain material facts and details and does not even give rise to a cause of action; that no application as contemplated by Rule 49(6) of the Rules was made as is apparent from the very case set up by the election petitioner and a perusal of her cross-examination would show that plea of having filed an objection application before the Returning Officer at the time of counting was nothing but an afterthought and the election petitioner is estopped from claiming any order for recounting.

Learned counsel Mr.Manish Shishodia appearing for the petitioner while pressing the grounds aforesaid has submitted that no such application as contemplated by Rule 49(6) was moved and has contended with reference to the decisions of the Hon'ble Supreme Court in Ram Rati Vs. Saroj Devi & Ors. : (1997) 6 SCC 66, Chandrika Prasad Yadav Vs. State of Bihar & Ors.: (2004) 6 SCC 331 and Hoshila Tiwari Vs. State of Bihar & Ors.: (2005) 12 SCC 342 that the mandatory provisions of making application for recounting having not been complied with and no explanation having been furnished for such non-compliance, the election petitioner is not entitled to seek recount. Learned counsel has contended with reference to the decision of the Hon'ble Supreme Court in Jitendra Bahadur Singh Vs. Krishna Behari & Ors.:

AIR 1970 SC 276 and the decision of this Court in Kripal Singh Vs. Darshan Singh & Ors. : 1986 WLN (UC) 202 that an order for inspection of ballot papers or recount of votes can only be passed if two conditions are satisfied that the election petition contains adequate statement of material facts and the Tribunal trying the petition is prima facie satisfied that to do complete justice between the parties and to decide the dispute, inspection of the ballot papers is necessary. Learned counsel contended that neither the election petition contains material particulars nor the learned Judge has reached any positive finding and recount has been ordered as a matter of course by simply reproducing the text of the evidence without analysing the same and the same has resulted in jurisdictional error that would go long way to violate the secrecy of ballots and, therefore, the impugned order deserves to be set aside.

Learned counsel Mr.T.C.Sharma appearing for the contesting respondent (election petitioner) has supported the impugned order with the submissions that the election petitioner has specifically pointed out in the election petition itself of having raised objections before the Returning Officer and has also pointed out about the application having been made regarding the disputed 150 votes through her agent and these votes were kept aside as rejected but then were counted in favour of the returned candidate. Learned counsel has referred to the testimony of AW-2, AW-3 and AW-4 and submitted that the persons present at counting have supported the

case of the election petitioner about objections in relation to the disputes votes. Learned counsel has also urged that even in view of discrepancy about the number of votes cast and number of votes received by the respective candidates, a strong case for recount is made out. Learned counsel has submitted with reference to the decision of the Hon'ble Supreme Court in *Sohan Lal Vs. Babu Gandhi and others*: (2003) 1 SCC 108 and *Chandrika Prasad Yadav's case* (supra) that the case of *Ram Rati* (supra) sought to be relied upon by the petitioner has already been over-ruled by the Hon'ble Supreme Court and that Rule 49(6) is only directory and even if no application is made in a given case, recount could be ordered, if found necessary. Learned counsel has also referred to the decisions of the Hon'ble Supreme Court in *Ram Sewak Yadav Vs. Hussain Kamil Kidvai and others*: AIR 1964 SC 1249, *N.E.Horo Vs. Leander Tiru and others*: AIR 1989 SC 2030, *Bashir Ahmad Vs. Ghulam Quadir Mir and others*: (1977) 1 SCC 285, *I.Vikheshe Sema Vs. Hokishe Sema*: (1996) 4 SCC 53 and of this Court in *Amarjeet Singh Vs. Shri Sampuran Singh*: 1991(2) WLC 188.

Having given a thoughtful consideration to the rival submissions; and having examined the pleadings of the parties and their respective statements, this Court is of opinion that on the facts and in the circumstances of the present case, the impugned order for inspection and recount remains absolutely unjustified and cannot be sustained.

In the present case, the election petitioner has taken absolutely cursory, vague and frivolous pleadings and it has been suggested as if 120 votes were counted improperly for the returned candidate despite the said ballot papers not having seal at the proper place and the seal having been put at the dividing line between the names of Smt. Bimla and Smt. Kalawati wife of Jhandu Ram. If that were so, objections would have come up from all the candidates and particularly from the said Smt. Kalawati wife of Jhandu Ram too. There is nothing concrete on record to believe that any objection was raised by the said other Smt. Kalawati. Similarly, allegation of 30 ballot papers carrying thumb impressions is also vague and suffers from the want objection at the relevant time. Having regard to the nature of objections sought to be taken in this election petition, not filing of objections in writing at the relevant time cannot be ignored as irrelevant a factor.

The election petition does not contain specific averment about filing of written application by the election petitioner or her agent before the Returning Officer; and the election petitioner has contradicted herself her in cross examination on this aspect of moving of the application. The election petitioner has stated,-

“मैंने गिनती के समय इन 150 वोटों के बाबत दरखास्त दी थी। दरखास्त मेरे एजेंट भागाराम ने लिखी थी। दरखास्त गिनती करने वाले को दी थी। यह दरखास्त हमारे 6 उम्मीदवारों के हस्ताक्षर करवाने के बाद दी थी फिर कहा की मुझे पुरा ध्यान नहीं। मैंने लिखित में दरखास्त दी या नहीं पुरा ध्यान नहीं फिर कहा कि दर० तो दी थी। दर० में घपला बाजी का लिखा था पूरा ध्यान नहीं की क्या लिखा

था। दर० लिखने के लिए मैंने भी बताया था व भागाराम स्वयं ने भी लिखी थी। दर० पर हस्ताक्षर किये थे नकल नहीं हैं 120 मत-पत्रों को गिनती के समय खारीज माने थे और 30 अगूठे वाले वोट भी खारीज माने गये थे। गिनती के समय तक 150 वोट बिमला के खाने में नहीं मिलाये। 13 मत-पत्रों पर दो-तीन जगह मोहरे लगी हुई थी। वह किस-2 उम्मीदवार के खाने में लगे थे ध्यान नहीं। हमारे 6 वों उम्मीदवारों के हस्ताक्षर/अगूठे होने से पहले मैंने दर० इन 150 मत-पत्रों बाबत क्यों नहीं दी इसका कारण मैं नहीं बता सकती। मैंने दुबारा मत-पत्रों की गिनती करने की दरखास्त भी गिनती करने वाले को दी थी। रिजल्ट की घोषणा पर हमारे हस्ताक्षर करवाने के बाद दुबारा गिनती की दर० दी थी। वह दर० भी भागीरथ ने लिखी थी। मैंने घोषणा से पहले दर० नहीं दी जुबानी दुबारा गिनती के लिए कहा था। उन्होंने कहा गिनती दुबारा कर लेगे एक बार हस्ताक्षर कर दो।"

In the face of vague pleadings and uncertain and self-contradictory statements, the learned judge has been wholly unjustified in observing that whether the demand for recounting was oral or written, recounting was not carried out. The findings are more vague than the pleadings. Such an order for the purpose of violating the secrecy of ballot cannot be appreciated nor could be approved.

It may be pointed out that along with the present writ petition, this court has also considered another cognate matter involved in S.B. Civil Writ Petition No, 6979/2005: Madan Lal Vs. Sunil Kumar, that has been decided today by a separate order. In the said writ petition also an order passed on 29.11.2005 by the same learned Civil Judge in another Election Petition for inspection and recount has been considered; and the said order dated 29.11.2005 has been maintained with partial modification. In relation to the said case of

Madan Lal, this Court found on the earlier occasion on 27.10.2005 while dealing with earlier writ petition No.5855/2005 that the order of inspection was made contrary to the requirements of law without recording any prima facie finding on the relevant questions and, therefore, this Court set aside the said order but with observations that the Tribunal could have reached to the findings prima facie on the basis of evidence and the Tribunal failed to apply its mind on evidence for the purpose of drawing inference for ordering inspection of ballot papers. The learned Civil Judge took up the matter after passing of the order by this Court and framed two points for determination on the questions as to whether the election petitioner did move an application before the Returning Officer and as to whether the election petitioner has been able to establish prima facie that inspection and counting of the ballots was necessary in the interest of justice and for effectual determination of the dispute? The learned Judge thereafter recorded finding on point No.1 that the election petitioner did move such application before the Returning Officer. On the second question about prima facie case, the learned Judge took note of the pleadings and the evidence on record and thereafter noticed that in relation to 18 rejected votes, the case of the election petitioner was about the seal having been put in his column in 10 ballot papers but impression having occurred at other place because of wrong folding. Learned Judge also noticed the case of the returned candidate in relation to those 18 rejected votes that 14

ballot papers carried seal against the name of two or more candidates, his 1 vote was rejected because of wrong folding of the ballot paper and the impression occurring in other column, 2 were absolutely blank and 1 ballot paper was having the seal at the name of the place. Learned Judge also noticed the case of the election petitioner about 5 votes counted for the returned candidate, that three of them were containing thumb impressions and 2 were having seals in between the names of Madanlal son of Darshanand and Madanlal son of Ramlal. After noticing such evidence, the learned Judge found that the election petitioner was able to make out a prima facie case for inspection and recount.

In the aforesaid case of Madanlal, when the order for inspection and recount was made with such findings on the questions involved, looking to the narrow margin (of 2 votes) between the election petitioner and the returned candidate, and looking to the case set up by the returned candidate, this court has upheld the order dated 29.11.2005 but only to the extent of inspection and recounting of the disputed ballot papers; and not to go the whole hog. This court has observed and held,-

“However, having examined the findings of the learned Civil Judge and the case set up by the election petitioner, this Court is constrained to observe that though entering into the same arena over again, after the order passed by this Court on 27.10.2005, the learned Judge has yet not examined the law applicable to the case; and after considering the case of the parties regarding 18 disputed rejected votes and 5 disputed votes counted in favour of the

petitioner, has not limited the order in relation to the disputed ballot papers only and has ordered as if all the ballot papers of the said election are to be put to recount. Such an uncertain order neither serves the cause of justice nor could be approved.

Having regard to the questions involved in the case, this Court is clearly of opinion that only the disputed ballot papers ought to be perused and considered and it is not a case where the entire counting is to be taken up over again. The inspection and recount is made for the purpose of determination of the questions arising in the election petition and else it is not as if the Tribunal is to examine a document or to enter into a review of the entire counting. The learned Judge has apparently not considered the sacred nature of the ballot papers carrying the wish of the electorate and has failed to consider that the secrecy of ballot is sacrosanct and is permitted to be violated only when and to the extent interest of justice demands and else the election petition is not meant for simply seeking recount on mere allegations. In the present case, recount to the limited extent is countenanced particularly in view of the case set up by the present petitioner, returned candidate himself but having regard to the overall circumstances of the case, the impugned order is required to be modified to remain limited in relation to the disputed ballot papers only and not beyond. “

This court is constrained to observe, after examining the orders passed by the learned Judge in the present case and so also in the case of Madan Lal (*supra*), that the learned Judge has not cared to look into the law applicable to the election petitions and has proceeded as if whenever there is allegation of improper counting, the election Tribunal, for the purpose of determination of the questions involved in the election petition, has always a short-cut available to call for the ballot papers and examine and/or recount them. The approach falls short of the basic requirements of law.

As repeatedly held by the Hon'ble Supreme Court, recount and inspection of ballot papers cannot be ordered as a matter of course and the requirement of law remains that there ought to be a prima facie case, material facts ought to have been pleaded and a fishing and roving enquiry would not be made while directing recount of votes.

The learned Judge has observed that there was discrepancy in total number of votes and so also in the votes received by Kalawati wife of Jhandu Ram. Whether such discrepancy has any material bearing on the result has not been considered. The allegations about 150 ballot papers having been set apart as invalid and then having been counted by way of three stacks of 50 each by mixing them with the votes of the petitioner Smt.Bimla is not stated in the election petition. Margin of victory whether of 46 votes or of 50 votes in an electoral college of about 2230 voters cannot be said to be a narrow or thin margin.

Learned counsel for the election petitioner has referred to the statements of AW-2, AW-3 and AW-4 and to the averments in para 4 (Gha) in the election petition to submit that the election petitioner did make an application for recounting before the Returning Officer. The submissions are fundamentally laconic when examined in the light of uncertain and rather self-contradictory statements of the election petitioner as reproduced hereinabove. She is not certain whether application in writing was moved during the counting or not

but then has stated that the application was moved after signatures of all the candidates on the declaration of result and the application had been allegedly made by her agent whose name has also been stated as Bhagaram at two places and as Bhagirath at another; and he has been examined as AW-4 Bhagwat Dayal. Be that as it may, the statement of AW-4 as noticed by the learned Civil Judge in the impugned order do not bring out corroboration of the statement of the election petitioner Smt. Kalawati even on basic and fundamental facts. There is no documentary evidence available on record to prove moving of such application and of its contents. In the face of such uncertain material on record, the learned Judge has chosen the short-cut of recounting that cannot be countenanced.

This Court is constrained to reiterate the same observations as were made while allowing Writ Petition No.5885/2005 on 27.10.2005 that merely because the Tribunal observes that it was difficult to assess oral evidence of the parties, the ballot papers may not be inspected because if such plea be the ground for inspecting the ballot papers then that would be available in all those cases when there are allegations in the election petition of wrongful rejection or acceptance of the ballot papers. An election petition cannot be approached in the manner that whenever a dispute about improper counting is put forth, the Tribunal would immediately fish out the ballot papers and then examine such allegations. Secrecy of

ballot is sacrosanct and could least be violated in such a slipshod manner.

In the present case, this Court is satisfied that there has been absolutely no reason or justification for ordering inspection or recount and the impugned order disclosing errors apparent on the face of the record and leading to manifest failure of justice cannot be sustained.

As a result of the aforesaid, this writ petition is allowed and the impugned order dated 03.12.2005 is quashed and set aside. The learned Civil Judge shall proceed with determination of the questions involved in the case on the basis of material on record. The petitioner shall be entitled to the costs of this writ petition from the respondent No.1, quantified at Rs. 2200/-.

(DINESH MAHESHWARI), J.

MK